Nos. 11-338, 11-347

In The Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ASSOCIATION OF OREGON COUNTIES, IDAHO ASSOCIATION OF COUNTIES, ASSOCIATION OF O & C COUNTIES, AND DOUGLAS COUNTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS DOUG DECKER, ET AL., AND PETITIONERS GEORGIA-PACIFIC WEST, INC., ET AL.

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Pursuant to Supreme Court Rule 37, the Association of Oregon Counties, Idaho Association of Counties, Association of O & C Counties, and Douglas County (collectively "Counties") respectfully submit this brief *amici curiae* in support of Petitioners Doug Decker, et al. and Petitioners Georgia-Pacific West, Inc., et al.[1]

INTEREST OF *AMICI CURIAE*

The Association of Oregon Counties ("AOC") is an intergovernmental agency of county governments established under the laws of Oregon. The AOC has no subsidiary or parent organizations, and it has no shareholders. AOC is an advocate for county government and county officials in their relationships with Congress, the Oregon Legislature, and the various federal and state agencies.

The Idaho Association of Counties ("IAC") is a non-profit, non-partisan service organization dedicated to the improvement of county government. IAC was designed and incorporated by county elected officials

[1] All counsel of record have consented to the filing of this brief. Petitioners Georgia-Pacific West, Inc., et al., Petitioners Decker, et al., and Respondents have all filed blanket consents. In accordance with Rule 37.6, *amici* state that no counsel for a party authored or authorized this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

under Idaho law and under Section 501(c)(4) of the Internal Revenue Code to provide services, research, uniformity, and coordination among member counties in order for county elected officials to better serve their constituents. IAC has no subsidiary or parent organizations. Its members are the 44 Idaho counties.

The Association of O & C Counties ("Association") is an unincorporated, voluntary association of the 18 counties in western Oregon that are the beneficiaries of the lands managed by the Bureau of Land Management under the O & C Act of 1937 (Act of Aug. 28, 1937, c. 876, Title I, §1) (43 U.S.C. §1181a *et seq.*). The Association has no subsidiary or parent organizations and has no shareholders.

Douglas County is a county government established by the State of Oregon and as such has no subsidiary or parent organizations, nor any shareholders. Douglas County maintains a system of county roads over which the public has a right of use for forestry, industrial, recreational, domestic and general use.

The Counties have a vital interest in the definitive resolution of the question whether the runoff from that subset of their public roads that are used as logging roads are subject to the permitting requirements of the National Pollutant Discharge Elimination System ("NPDES") of the Clean Water Act ("CWA") (33 U.S.C. §1342).

INTRODUCTION

In *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011), the Ninth Circuit ruled that the storm water runoff from logging roads that is collected and then discharged by ditches, culverts and channels is a point source discharge for which a permit is required under the National Pollutant Discharge Elimination System provisions of the Clean Water Act pursuant to 33 U.S.C. §1342.

Before the Ninth Circuit, the State of Oregon and the Environmental Protection Agency ("EPA") argued that these roads have been exempted from NPDES permitting under EPA's Silvicultural Rule and under EPA's Storm Water Rules. In rejecting these arguments the Ninth Circuit failed to give deference to the long-standing interpretations of EPA on this precise issue. As both the Petitioners have argued, the Ninth Circuit's decision is wrong as a matter of basic statutory interpretation.

The Counties agree with the Petitioners' positions and wish to bring to the attention of the Court the unwarranted burden the Ninth Circuit's ruling places on the counties. The ruling imposes a costly and unwarranted permitting burden on county governments nationwide to address runoff that EPA and the respective states have addressed in their respective nonpoint source control programs.

SUMMARY OF ARGUMENT

In enacting the Clean Water Act, Congress delegated to the Environmental Protection Agency ("EPA") the authority to adopt a consistent program to regulate point sources[2] and nonpoint sources of pollution. Among the rules EPA promulgated to implement the CWA was the Silvicultural Rule wherein EPA clarified which silvicultural practices were point sources to be regulated under the National Pollutant Discharge Elimination System (33 U.S.C. §1342) and which of these practices were to be regulated under the respective state's nonpoint pollution control systems (33 U.S.C. §1329). EPA's Silvicultural Rule clarified that the runoff from timber harvest activities was to be managed as a nonpoint source. The Ninth Circuit erred in failing to defer to EPA's reasonable interpretation that these silvicultural activities were to be controlled under the various states' nonpoint source programs.

Secondly, in the 1987 amendments to the CWA Congress directed EPA to establish a program to regulate the storm water discharges "associated with industrial activity." 33 U.S.C. §1342(p)(2)(B). EPA

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[2] The "term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. The term does not include agricultural storm water discharges and return flows from irrigated agriculture." 33 U.S.C. §1362(14).

subsequently through notice and comment rulemaking defined these discharges as only those discharges that were directly related to manufacturing, processing or raw materials storage areas at an industrial plant. 40 C.F.R. §122.26(14). The Ninth Circuit improperly rejected EPA's interpretation of the ambiguous phrases found in the storm water statutes as well as EPA's interpretation of the ambiguous phrases found within its own regulations.

Third, the Ninth Circuit in requiring NPDES permits for the ditches, culverts and conveyances along primarily logging roads, improperly rejected the EPA's reasoned interpretation that the phrase "immediate access roads" in the context of storm water "associated with an industrial activity" did not include state, local or federal roads. "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges," 55 FR 47990-01, 1990 WL 348331 (FR), p. 34.

Fourth, by redefining as point sources those county and state roads that are used to access industrial operations, the Ninth Circuit imposed a costly and unnecessary permitting burden on county governments.

ARGUMENT

The Ninth Circuit's far-reaching decision in *Northwest Environmental Defense Center v. Brown*, 640 F.3d 1063 (9th Cir. 2011), displaced the long-standing manner in which the Environmental Protection

Agency and the State of Oregon implement the storm water control provisions of the CWA (33 U.S.C. §1342(p)) and should therefore be reversed. The decision below was not only inconsistent with the State of Oregon's and EPA's long-standing interpretations, if left in place it could have serious repercussions on the counties and their ability to maintain their road systems while meeting their other statutory public service obligations.

I. The Ninth Circuit's rejection of EPA's reasonable interpretation of the Clean Water Act is unwarranted.

In *Northwest Environmental Defense Center v. Brown*, the Ninth Circuit shifted the management of storm water runoff associated with logging roads from the traditional nonpoint source control programs, 33 U.S.C. §1329, that are generally managed by the respective States, to a system requiring NPDES permitting for all the culverts and ditches along logging roads under 33 U.S.C. §1342.

Northwest Environmental Defense Center ("NEDC") challenged EPA's and the State of Oregon's long-standing interpretations by alleging that the State of Oregon as the owner, or as the operator, of the Trask River Road and the Sams Down Road[3] was in

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Part of the Trask River Road is a county road that traverses lands owned by the State of Oregon. Sams Down Road is a State owned road. Both roads are used by timber purchasers

(Continued on following page)

violation of the CWA by allowing the discharge of storm water runoff from these logging roads without first acquiring a NPDES permit.

NEDC contended that since these roads were used to haul timber to sawmills the storm water runoff from these roads represented a "discharge associated with industrial activity" and as such the roads were automatically subject to the NPDES permitting requirements under 33 U.S.C. §1342(p)(2)(B). NEDC sought to shift the storm water control focus from the State of Oregon's approved nonpoint pollution control program to a NPDES permitting program.

The Defendants Decker, et al., and Intervenor-Defendants Georgia-Pacific West, Inc., moved to dismiss the case based on EPA's Silvicultural Rule, 40 C.F.R. §122.27, and EPA's Storm Water Rule, 40 C.F.R. §122.26, under which logging roads were excluded from the NPDES permitting requirements. EPA filed an *amicus* brief in support of the motion to dismiss, explaining that storm water runoff from logging roads was not the type of discharge Congress had directed be subject to permitting (*See* United States' *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, 3:06-cv-01270 filed Dec. 6, 2006, C.R. 44).

The Ninth Circuit rejected EPA's interpretation of the CWA and crafted an entirely new program to

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to remove timber harvested from State of Oregon owned forest lands.

control runoff from logging roads. This judicially created program ignored not only the long-standing interpretations of EPA and the State of Oregon that runoff from nonpoint pollution sources was to be controlled by the States, and ignored EPA's Silvicultural Rule designating these forest practices as nonpoint sources.

A. The Silvicultural Rule was an appropriate interpretation of the Clean Water Act.

The Silvicultural Rule distinguished which silvicultural activities were to be "silvicultural point sources" and subject to permitting (40 C.F.R. §122.27), as opposed to those "silvicultural nonpoint sources" which were subject to State management.

During its rulemaking EPA defined the "silvicultural point sources" as:

> any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States.

40 C.F.R. §122.27(b)(1).

In response to comments raised during the rulemaking, EPA clarified that the logging roads were

nonpoint sources when it stated that the term silvicultural point sources:

> does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, ***harvesting operations, surface drainage,*** *or* ***road construction and maintenance from which there is natural runoff.***

40 C.F.R. §122.27(b)(1) (***emphasis*** added).

The Ninth Circuit rejected EPA's long-standing interpretation and displaced it with the Panel's own interpretation that culverts and ditches along logging roads are point sources to be regulated under the NPDES permitting program.

The Ninth Circuit ignored that when, as in this situation, Congress has delegated to the agency the authority to implement a statute and the agency has interpreted ambiguous provisions thereof through rulemaking, then the Court is not to substitute its own construction of the statutory provision for a reasonable interpretation made by the administrator of the agency. *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). The views of EPA, the agency charged with implementing the Clean Water Act, as established in the 1976 Silvicultural Rule, are entitled to *Chevron* deference.

B. EPA's interpretation of the discharges subject to the Phase-1 and Phase-2 Storm Water Rules was well reasoned and appropriate response to public notice and comment rulemaking.

EPA's interpretation that only a limited subset of silvicultural activities were considered point sources was also reflected in EPA's 1990 rulemaking relative to the storm water discharges associated with industrial activities. During this rulemaking EPA interpreted the phrase "storm water discharge associated with industrial activity," that was included in the 1987 storm water amendments to the CWA, as excluding those discharges previously excluded from the NPDES program under EPA regulations – such as those associated with facilities and activities excluded under the Silvicultural Rule.[4]

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[4] In its 1990 rulemaking, EPA specifically reexamined whether logging should be included as an activity associated with an industrial activity or facility and elected to continue to exclude these activities. In response to a commenter's statement that runoff from logging operations should be controlled by BMPs in effect for such industries and that a permit would be impractical and cost prohibitive, EPA stated:

> "EPA agrees with the commenter that this provision needs clarification. The existing regulations at 40 CFR 122.27 currently define the scope of the NPDES program with regard to silvicultural activities. 40 CFR 122.27(b)(1) defines the term 'silvicultural point source' to mean any discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with

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As part of the 1987 amendments to the CWA, Congress adopted a two-phase approach to management of storm water discharges. During the first phase, Congress directed that five specific types of storm water discharges were to be automatically subject to permitting ("Phase I"). 33 U.S.C. §1342(p)(2) & (3). Among these Phase 1 storm water discharges were "discharges associated with industrial activities." 33 U.S.C. §1342(p)(2). With respect to the remaining non-Phase 1 storm water discharges, Congress directed that EPA, in consultation with the States, was to identify which of these other forms of storm water discharges existed and were not regulated under Phase I. 33 U.S.C. §1342(p)(5). Based on these

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> silvicultural activities and from which pollutants are discharged into waters of the United States. Section 122.27(b)(1) also excludes certain sources. The definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under NPDES. EPA does not intend to change the scope of 40 CFR 122.27 in this rulemaking. Accordingly, the definition of 'storm-water discharge associated with industrial activity' does not include sources that may be included under SIC 24, but which are excluded under 40 CFR 122.27."

55 FR 47990-01, 48011; 1990 WL 348331 (FR), p. 37.

In 1990 EPA specifically considered the issue of what silvicultural activities were subject to NPDES permitting and reaffirmed its earlier decision that the silvicultural activities (*e.g.*, harvesting operations, surface drainage and road construction and maintenance) that had been previously identified as not subject to NPDES permitting were also excluded from permitting under the Storm Water Rule.

studies, EPA in consultation with State and local officials issued regulations to address the non-Phase 1 storm water discharges that the EPA deemed necessary. 33 U.S.C. §1342(p)(5)(C) & (6). The non-Phase I discharges that EPA determined were to be subject to permitting became known as Phase II discharges.

In the 1987 amendments to the CWA, Congress left to the discretion of EPA several key elements of the industrial storm water discharge program. For example it left it to EPA to precisely define any ambiguous phrases (*e.g.*, "associated with industrial activity" as referenced in 33 U.S.C. §1342(p)(2)(B)), and, granted to EPA the express authority to identify the non-Phase 1 storm water discharges for which control methods and procedures were necessary. 33 U.S.C. §1342(p)(5).

In response, EPA undertook public notice and comment rulemaking wherein it adopted the "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges," 55 FR 47990-01, 1990 WL 348331 (FR) and defined therein the phrase "associated with industrial activity" as:

> [s]torm water discharge associated within industrial activity means[5] the discharge from any conveyance that is used for collecting

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[5] The use of the verb "means" indicates a narrower textual meaning than the phrase "includes." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 132 S. Ct. 2156, 2170 (2012).

> and conveying storm water and that is ***directly[6] related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122.***[7]

40 C.F.R. §122.26(b)(14) (***emphasis*** added).

EPA thereby effectively established a three part test that required there be: first, a direct relationship – rather than an indirect relationship – between the road and the industrial activity; secondly, that the activity be one of the specific activities identified (*e.g.*, manufacturing, processing or raw materials storage); and, third, that the discharge occur from a conveyance directly related to the "areas" used at an industrial plant for manufacturing, processing or raw materials storage. Neither the Trask River Road nor the Sams Down Road met any of these elements.

During the 1990 rulemaking, EPA also interpreted the phrase "associated with industrial activity" as not including activities that were excluded from NPDES permitting pursuant to 40 C.F.R. §122. Among these excluded activities were the activities

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[6] Black's Law Dictionary (Sixth Edition) defines "direct" as "immediate; proximate; by the shortest course; without circuitry; operation by an immediate connection or relation; instead of operating through a medium; the opposite of indirect."

[7] Part 122 is a reference to 40 C.F.R. §122 which includes among other items the Silvicultural Rule.

previously described in the 1976 Silvicultural Rule as nonpoint sources. *See* 40 C.F.R. §122.27.

The Ninth Circuit erred in rejecting EPA's interpretation that the phrase "associated with an industrial activity" was an ambiguous phrase left to EPA to define by regulation, and, erred in rejecting EPA's reasonable interpretation that the nonpoint runoff identified by the Silvicultural Rule did not represent "discharges associated with an industrial activity."

The Ninth Circuit also overlooked that in addition to the limitations expressly stated in 40 C.F.R. §122.26(b)(14), EPA had also clarified in the 1990 rulemaking that

> [f]or the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; ***immediate access roads and rail lines*** used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites;. . . .

40 C.F.R. §122.26(b)(14)(ii) (***emphasis*** added).

While the Ninth Circuit concluded that a road used for logging purposes represented an *immediate access road* that is exclusively or primarily dedicated for use by the industrial facility, it failed to defer to EPA's long-standing interpretation that the phrase "associated with industrial activity" required that the discharge from an immediate access road must be not only from a ditch or culvert that is used to collect and

convey storm water, it must also be "***directly related*** to manufacturing, processing or raw materials storage **areas *at an industrial plant***." (40 C.F.R. §122.26(b)(14)) (***emphasis*** added) – not as in this case roads that are only indirectly related to the industrial plant areas.

In its 1990 rulemaking EPA clarified that it:

> intends the language 'immediate access roads' (including haul roads) to refer to roads which are ***exclusively or primarily dedicated for use by the industrial facility***.

55 FR 47990-01 at 48009; 1990 WL 348331 (FR), p. 34 (***emphasis*** added). This limitation emphasized that the roads were to be directly related to a specific industrial facility.

In taking an expansive view of the "primarily dedicated" aspect of this rule, the Panel not only overlooked this limitation, it also overlooked the subsequent sentence in the same paragraph wherein EPA clarified that the phrase "associated with an industrial facility" did not include state, county or federal roads.

> EPA does not expect facilities to submit permit applications for discharges from ***public access roads such as state, county, or federal roads such as highways or BLM roads which happen to be used by the facility***.

55 FR 47990-01 at 48009; 1990 WL 348331 (FR), p. 34 (***emphasis*** added).

The EPA's interpretation was a significant qualifier. By publishing the interpretation in the Federal Register concurrent with its adoption of the final rule, EPA clearly informed regulated parties of EPA's interpretation and EPA left little question that it considered that the public roads were not included within the phrase "immediate access roads."

In classifying the Trask River Road and the Sams Down Road as immediate access roads, the Ninth Circuit deferred to one element of EPA's clarification but overlooked other language in the same paragraph wherein EPA expressly excluded from the definition of "immediate access roads" the state, county and federal roads.

The Panel's decision that the Trask River Road and the Sams Down Road are exclusively or primarily dedicated for use by an industrial facility has swept into the NPDES permitting process not only private roads that were previously excluded under the Silvicultural Rule, but also large numbers of public roads owned and managed by the various counties – roads EPA had previously excluded from the definition of "immediate access roads" in the Storm Water Rules.

Since EPA was delegated the authority to interpret the CWA's storm water provisions, and inherent within this delegation was the authority to adopt regulations relative to the reach of the ambiguous phrase "associated with industrial activity," *Chevron* deference to EPA's interpretation is warranted.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

Under *Chevron*, EPA's interpretation that state, county and federal roads are not immediate access roads associated with industrial activity, is binding unless the rulemaking was procedurally defective, arbitrary or capricious in substance or manifestly contrary to the statute. *Id.* at p. 844. None of these procedural defects were present in the 1990 rulemaking.

EPA's interpretive choice that the state and county roads are not "immediate access roads" is a well-reasoned interpretation based on the experience and informed judgment of the agency, an interpretation that was developed based upon public comment during the concurrent rulemaking as well as in response to EPA's prior studies conducted under 33 U.S.C. §1342(p)(5). The judgment of EPA in this matter reflected a well-reasoned guidance. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998).

Further, EPA's definition and interpretation that the state and local roads are not immediate access roads is an interpretation of ambiguous language in its own rule thereby warranting decisive weight. It represents a fair and considered interpretation of an ambiguous phrase – "immediate access roads" – made at the time of adoption of the regulation and was not a *post hoc* rationalization. *Auer v. Robbins*, 519 U.S. 452, 462 (1996).

Likewise, EPA's interpretation should be afforded persuasive weight since it was developed after thorough study of the storm water discharges and followed public notice and comment rulemaking; represented valid reasoning; and, was consistent with its own rules and pronouncements. *See generally*, *Christopher v. SmithKline Beecham Corp.*, 547 U.S. ___, 132 S. Ct. 2156, 2166-69 (2012).

The Ninth Circuit's ruling must be reversed for failing to defer to EPA's and the State of Oregon's long-standing interpretation of the CWA relative to management of storm water discharges from logging roads; and, by failing to defer to EPA's long-standing interpretation that State or county roads are not local access roads associated with an industrial activity. As a result of these errors, the Ninth Circuit has upset the established CWA management programs and imposed a substantial burden on otherwise financially strapped counties.

While the Ninth Circuit appears to have assumed that the "primary logging roads" are built and maintained solely by the logging companies or by the operators of an industrial facility (*see Northwest Environmental Defense Center v. Brown* at p. 1084), this assumption is clearly in error. In this case, the Trask River Road and the Sams Down Road are State and county owned roads. What the Panel overlooked is that a large number of local access roads, if not the majority, are owned, built and maintained by Oregon Counties, the State of Oregon, the United States

Forest Service or the United States Bureau of Land Management.[8]

Reversal is warranted in that the Ninth Circuit has established a new and unprecedented burden requiring NPDES permitting for County roads merely because they are used for logging purposes. This drastic shift in the manner in which the CWA is implemented warrants reversal by this Court.

II. The NEDC decision will impose extensive and cost prohibitive permitting costs on local governments thereby restricting their ability to provide essential public services.

The Ninth Circuit's new NPDES permitting requirement on county roads used for logging purposes imposes an extensive and cost prohibitive permitting and monitoring requirement upon the counties – a burden they can ill afford without sacrificing funding for other essential services.

To illustrate the magnitude of the problem created by the Ninth Circuit's decision, the Association of Oregon Counties surveyed the various County Road Supervisors in Oregon to determine the number of County roads that would be defined as "primarily

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[8] While the Ninth Circuit recognized that these public roads afforded access for logging and for recreation purposes, it failed to recognize that these public roads also provide other significant public functions including residential, utility and public safety access.

logging roads" as that phrase was used in the Ninth Circuit's decision. *See* Association of Oregon Counties, *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir. filed Oct. 15, 2010) (C.R. 95).

The County Road Supervisors identified that the county road systems within Oregon contain approximately 4,800 miles of roads that fall within what the Ninth Circuit defined as "primarily logging roads." Association of Oregon Counties *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir. filed Oct. 15, 2010) (C.R. 95).

The Road Supervisors calculated that associated with these 4,800 miles of primary logging roads are approximately 20,000 cross culverts (culverts that cross under the primary logging road). Not included within this analysis are the culverts that do not cross under these "primary logging roads" but cross connecting side roads or private access driveways. Association of Oregon Counties, *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir. filed Oct. 15, 2010) (C.R. 95)).

In addition to the "primary logging roads" identified by the County Road Supervisors, the Association of O & C Counties also identified within the 2.1 million acres managed by the Bureau of Land Management ("BLM") within Oregon an additional 16,817 miles of "primary logging roads" along with 40,500 culverts. Association of Oregon Counties *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v.*

Brown, No. 07-35266 (9th Cir. filed Oct. 15, 2010) (C.R. 95).

Likewise, with respect to the Forest Service's roads in Oregon, the Oregon Department of Transportation in its 2009 Oregon Mileage Report also identified that there were 6,612 miles of Forest Service roads that are mostly logging roads. (Oregon Department of Transportation website; 2009 Mileage Report, p. 163) (http://www.oregon.gov/ODOT/TD/TDATA/rics/PublicRoadsInventory.shtml#Oregon_Mileage_Report) (last accessed August 3, 2012).

While a separate NPDES permitting system for the "primary logging roads" does not currently exist, the magnitude of the problem facing the counties can be quantified if one assumes that the same application requirements that are currently required for storm water discharges associated with industrial activity will be imposed for these "primary logging roads." *See* 40 C.F.R. §122.26(c).

Under 40 C.F.R. §122.26(c), each culvert and ditch that discharges storm water will require a NPDES permit application that includes at a minimum:

(a) a site map with topography, drainage structures, underground springs (40 C.F.R. §122.26(c)(1)(i)(A));

(b) an estimate of impervious surfaces and the total area drained by each outfall, along with a narrative of the past activities (40 C.F.R. §122.26(c)(1)(i)(B));

(c) certifications that each of the outfalls has been tested for non storm water discharge (40 C.F.R. §122.26(c)(1)(i)(C));

(d) information regarding significant spills of toxic or hazardous pollutants at the facility (40 C.F.R. §122.26(c)(1)(i)(D)); and,

(e) sample data collected during storm events from each of the outfalls (40 C.F.R. §122.26(c)(1)(i)(E)).

The requirement of subpart (b) that the owner of the primary logging road provide a narrative on past activities that have occurred within the drainage, standing alone, imposes an impossible burden on the counties since these past activities were often undertaken by adjacent landowners or operators. If the owner of the logging road is a county or other governmental entity, it is being placed in the position of collecting enormous amounts of data from the landowners or operators adjacent to its county road system yet these landowners have little incentive or requirement to provide this data.

Based upon the number of miles of "primary logging roads" identified by the various County Road Supervisors, the Association of Oregon Counties' Road Engineer estimated that to obtain permits for all of the cross culverts and roadway ditches associated with just the 4,800 miles of "primary logging roads" under county jurisdiction, there would be a permitting cost to the Oregon counties of approximately $56,000,000 (20,000 culverts x 40 hours staff time per

permit x $70 per hour = $56,000,000). Association of Oregon Counties, *et al.*, *Amicus* Brief, *Northwest Environmental Defense Center v. Brown*, No. 07-35266 (9th Cir. filed Oct. 15, 2010) (C.R. 95). This initial cost will be repeated as the permits expire and are renewed.

Not included within these estimates is the required pre-application sampling of each outfall during a storm water runoff event as required under 40 C.F.R. §122.26(c)(1)(i)(E) – a storm water sampling program that will be a staggering burden in its own right.

The data collection provisions of 40 C.F.R. §122.26(c)(1)(i)(E) require:

> "[q]uantitative data based on samples ***collected during storm events*** and collected in accordance with 122.21 of this part ***from all outfalls*** containing a storm water discharge associated with industrial activity for the following parameters: . . .
>
> (3) Oil and grease, pH, BOD5, COD, TSS, total phosphorous, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen;
>
> * * *
>
> (5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the method of flow measurement or estimation;
>
> (6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements

> or estimates of the storm event (in inches) which generated the sampled runoff and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event (in hours)."

(***emphasis*** added).

As with the requirement under 40 C.F.R. §122.26(c)(1)(i)(B) to obtain data as to the land practices in the drainage area of each culvert or ditch, to obtain this storm event data for each culvert or ditch outfall along the 4,800 miles of county owned "primary logging roads," as well as for the accompanying 20,000 cross culverts, imposes a staggering burden on the Oregon counties. Likewise, the burden on the various State and Federal permitting agencies to simply process the permit applications would also be staggering.

Oregon is not unique, for a similar burden will be experienced by forested counties in other States as well. To demonstrate the fiscal impact in other States, the Idaho Association of Counties surveyed the Road and Bridge Supervisors in Boundary County[9] and

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[9] Boundary County is located in the Northern Panhandle of Idaho bordering Canada. Boundary County has a population of 10,972 and a land area of 1,278.21 square miles, 90.4% of which is forested. The Boundary County Road and Bridge Department has jurisdiction over 340 miles of roads and bridges.

Valley County[10] to determine the number of county roads in each county that would be "primary logging roads" as that phrase was used in the Panel's decision.

The County Road Supervisors in these two counties identified that their respective county road systems include approximately 258 miles of "primary logging roads"[11] and approximately 1,807 cross culverts (culverts that cross under the county road) associated with these "primary logging roads."[12]

The Idaho Association of Counties estimates that if all cross culverts and roadway ditches required a NPDES permit, then for the 125 miles of "primarily logging roads" in Boundary County and their accompanying culverts under county jurisdiction, there would be a permitting cost to the Boundary County of approximately $1,318,800 (471 culverts x 40 hours staff time per permit x $70 per hour = $1,318,800). If required to comply with NPDES permitting requirements during FY2012, Boundary County would have been required to spend an estimated 55.7% of its

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[10] Valley County is located in South-Central Idaho and has a population of 9,862 and a land area of 3,733.66 square miles, 84.2% of which is forested. The Valley County Road and Bridge Department has jurisdiction over 763 miles of roads and bridges.

[11] The Ninth Circuit did not provide any guidance in defining the ambiguous phrase "primary logging roads," therefore the County Road Supervisors took a very conservative approach as to what roads would be included within this definition.

[12] Not included within this analysis were the culverts that do not cross under these "primary logging roads" but cross connecting side roads or private access driveways.

annual Road and Bridge Department Budget on compliance with NPDES permitting requirements for these "primary logging roads."[13]

Similarly, based upon the number of miles of "primary logging roads" identified by the Valley County Road Supervisor, the Idaho Association of Counties estimates that if all cross culverts and roadway ditches required a NPDES permit in Valley County, then for the 133 miles of "primarily logging roads" and their accompanying culverts under county jurisdiction, there would be a permitting cost to the county of approximately $3,740,800 (1,336 culverts x 40 hours staff time per permit x $70 per hour = $3,740,800). These NPDES permitting requirements would require Valley County to budget an estimated 75.1% of its annual Road and Bridge Department Budget on compliance with NPDES permitting requirements for these "primarily logging roads."[14]

These costs reflect only data on "primary logging roads" of two of the counties in Idaho. The statewide impact will be higher as the "primary logging road" permitting requirement is applied to the 32 other timber counties in the State.

The imposition of this new burden on the counties is occurring at a time when the counties with the

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[13] The FY2012 Road and Bridge Department budget for Boundary County was $2,369,701.

[14] The FY2012 Road and Bridge Department budget for Valley County is $4,981,588.

highest percentages of forest lands (federal, state and private), are facing dramatic reductions in the funding available for their road programs.

An example of the reduction in funding is dramatically illustrated by the reduction in U.S. Forest Service receipts transferred to the local counties for roads. Under the revenue sharing provisions of 16 U.S.C. §500 the counties receive 25% of the timber sale receipts generated from Forest Service timber sales within the respective counties for the purposes of funding local schools and roads. In 1990, immediately prior to the listing of the northern spotted owl under the Endangered Species Act (16 U.S.C. §1533), and, the subsequent shift in national forest policy with the adoption of the Northwest Forest Plan, the Oregon counties received $112,197,903 as their share of road receipts from the sale of timber harvested from the U.S. Forest Service lands.[15]

While federal programs (*e.g.*, Secure Rural Schools and Community Self-Determination Act of 2000 (Public Law 106-393 and extensions thereof)) have provided a safety net to avoid bankrupting county road programs as a result of reduced federal timber harvests, these federal safety net programs have dramatically declined and are currently on a year-by-year basis. For example, the current safety

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[15] In Oregon, these road funds are part of the respective general road funds of the counties and required to be used solely on the county's roads (ORS 368.705(2)).

net road funding for Oregon counties is now at $42,000,000 – a 64% decrease since 1990. If these safety net programs were not in place, the funding that the Oregon counties would have received from the actual harvest of timber from U.S. Forest Service lands in Oregon during the 2001 to 2011 time period would have been on average in the range of $3 to $4 Million annually – a decrease of 96-98% in road funding. *See* Association of Oregon Counties' website "History of USFS Payments to County Road Funds," http://www.aocweb.org/aoc/LinkClick.aspx?fileticket=YBpefzllB2I%3d (last accessed August 3, 2012). This reduction in road receipts affects most Oregon counties but hits hardest in those counties wherein the Federal forests represent the majority of the land base.

This reduction is particularly significant in Douglas County, a county with over 80% of its landmass within forests and, in turn, a large number of county roads used for logging purposes.[16] A Place called Douglas County, Douglas County Planning Department, 2nd ed. 1990.

Since the 2007 fiscal year, Douglas County has seen its federal forest revenues dedicated for road purposes decrease from $14,417,000 to the current

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[16] The majority of the forested lands within Douglas County are publically owned by the Federal agencies (*e.g.*, Bureau of Land Management and the United States Forest Service). A Place called Douglas County, Douglas County Planning Department, 2nd ed. 1990.

$5,533,335 for Fiscal Year 2011.[17] This 62% reduction in funding resulted in the Douglas County's Public Works Department reducing its spending on road maintenance 25% during this time period. In the event the Federal safety net programs are not renewed and the revenue sharing reverts back to the actual timber harvest receipts, Douglas County would be forced to further reduce its road maintenance programs or reallocate general funds from other programs such as public safety. The Ninth Circuit's imposition of a new NPDES permitting requirement for county roads used for logging purposes, comes at a time when revenue sources for public roads is dramatically being reduced and would therefore require a significant portion of the county road fund to be used to obtain permits rather than on-the-ground maintenance. In this case, for Douglas County the cost of NPDES permitting the 200 miles of forest roads that the Douglas County Public Works Department concluded were "primarily logging roads" is conservatively estimated at $1,120,000. This NPDES permitting cost represents 20% of Douglas County's Fiscal Year 2011 federal road receipts.

During this period of dwindling U.S. Forest Service receipts, the counties' general operating budgets have likewise been reduced, forcing reductions in road departments as well as other programs.

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[17] In Fiscal Year 2011 the Douglas County Public Works Department budget was $13,937,000.

For example, in the face of reduced Federal payments within the counties wherein the Forest Service and the BLM manage large percentages of the land base, counties have been forced to close libraries, lay off sheriff deputies and close jail beds. As a result of sharp reductions in revenues, at least two Oregon counties have been forced to release prisoners prior to their term of sentence or prior to trial. Adding an additional $56 Million cost to comply with the NPDES permitting requirement on these already cash strapped counties will constitute a significant social and economic burden on the counties yet afford little, if any, concurrent increase in water quality benefits.

Increasing the complexity of the issue are the reciprocal rights-of-way associated with the 1937 O & C Act lands managed by the Bureau of Land that creates a checkerboard of intermingled private and public land ownerships in Oregon. Access across this checkerboard is provided through numerous right-of-way agreements that provide the United States and the private landowners with the right to use and construct logging roads on each other's property. (*See* 43 C.F.R. §2812, *et seq.*). As a result of these road agreements, numerous landowners have rights to use roads that they do not directly control; likewise, they own roads that other landowners have rights to use.

Contrary to the Ninth Circuit's assumption that the "primary logging roads" are built and maintained by the logging companies, such is not the case, for there are hundreds, perhaps thousands, of intermingled

private and public owners within the O & C checkerboard, all of whom share the same interconnecting system of "primary logging roads." This interconnecting system of reciprocal rights-of-way is, in most cases, not associated either directly or indirectly with any specific industrial facility.

Unfortunately, the Ninth Circuit did not have the full picture of the storm water and nonpoint pollution control programs before it when the Panel concluded that these County and State roads were subject to NPDES permitting. As a result the Panel cast a broad net in defining primary logging roads without consideration of ownership or operational control.

The Ninth Circuit's NPDES permitting requirement is simply unworkable in that it requires each log-haul operator to have individual permits for culverts that underlie the roads the operator uses in transporting logs or other forest products. Multiple logging operations that all concurrently utilize the same logging roads would mandate multiple NPDES permits for the same culverts and ditches. Likewise, if other users of the road are associated with one of the other industrial activities defined under EPA regulations, then each of these industrial operators would be required to obtain independent NPDES permits for the same culverts and ditches.

The Panel simply miscomprehended the nature of the road system that is utilized for silvicultural purposes. Rather than defer to the established Federal, State and county programs for controlling the

storm water discharges associated with industrial and silvicultural activities, the Ninth Circuit imposed an entirely new interpretation of the CWA – an interpretation that imposes a staggering burden on the counties. To meet this burden, the counties will need to redirect funding from other essential services to fund this new and unwarranted permitting process.

As a result of the Ninth Circuit opinion, those counties with a significant percentage of private and public forest lands within their boundaries are being forced to allocate their dollars to acquire permits for activities that have limited impact on water quality rather than fund essential public services.

III. The State of Oregon controls storm water runoff associated with forest roads through an extensive program of regulations and best management practices.

An NPDES permit for county owned roadway culverts and ditches is simply the wrong tool for controlling water quality impacts associated with roads utilized for logging purposes. EPA has studied the question of the best management strategies for storm water runoff and recognized that the best control mechanisms are through the respective states' nonpoint pollution programs and not through the NPDES permitting process. The primary sources of pollution through a roadway culvert or ditch along these roadways is actually generated by activities conducted by the forest land owners who are not

necessarily the owners of the road. The county road authority seldom has the authority to control these activities, whether they are done on private land or land owned by another public agency.

The Ninth Circuit ignored that Congress has chosen to focus the CWA's NPDES permitting requirements on discharges of pollutants from point sources and a select number of storm water discharges, 33 U.S.C. §1342, rather than require NPDES permitting for runoff associated with nonpoint sources of pollution.

In accord with this focus, EPA's long-standing interpretation of the CWA storm water provisions has been that the subgroup of storm water discharges associated with silvicultural activities, including logging roads, was not subject to NPDES permitting; rather, these discharges were to be controlled as part of the State's primary responsibility to prevent, reduce and eliminate pollution, 33 U.S.C. §1251(b). The State of Oregon elected to address this responsibility through its nonpoint source control programs implemented under 33 U.S.C. §1329 and 33 U.S.C. §1288 rather than through the NPDES permitting program.

Recognizing that differences in climate and geography make nationwide uniformity in controlling nonpoint source pollution virtually impossible, Congress has traditionally depended on controls State or local in nature to manage these discharges and runoffs. *Oregon Natural Desert Association, et al. v.*

United States Forest Service, 550 F.3d 778, 785 (9th Cir. 2008).

In accord with this policy, and in reliance on its EPA approved nonpoint management program,[18] 33 U.S.C. §1329,[19] the State of Oregon promulgated administrative rules that established control measures to prevent or reduce nonpoint sources of pollution (*see* Oregon Administrative Rules 340-042-0025), including the discharges and runoff associated with silvicultural practices, *see* Oregon Administrative Rules 629, divisions 625, 635, 640, 645, 650, 655, 660.

Specific to logging roads, the State of Oregon incorporated into its Forest Practice Rules a series of best management practices[20] addressing logging road

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[18] Oregon Nonpoint Source Pollution Program 2011 Annual Report; http://www.deq.state.or.us/wq/nonpoint/docs/annualrpts/rpt11.pdf (last accessed August 9, 2012).

[19] The State of Oregon's program of non-point source management was established in 1978 and has been updated annually. (Oregon Nonpoint Source Control Program Plan; 2000 update, http://www.deq.state.or.us/wq/nonpoint/docs/plan/plan.pdf (last accessed August 9, 2012)). The State of Oregon's plan was adopted after public notice and opportunity to comment and was approved by EPA. 33 U.S.C. §1329(a) & (b).

[20] Best Management Practices ("BMPs") represent "schedules of activities, practices (and prohibitions of practices), structures, vegetation, maintenance procedures, and other management practices to prevent or reduce the discharge of pollutants to waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. *See* 40 C.F.R. §122.2.

construction and maintenance, *see* Oregon Administrative Rules 629-625.[21]

In addition to the best management practices for forestry operations, the State of Oregon also adopted an extensive program of best management practices for maintenance and construction of State highways. *See* Oregon Department of Transportation, Routine Road Maintenance, Water Quality and Habitat Guide Best Management Practices, Revised 2009 ("Blue Book"), http://cms.oregon.gov.com/ODOT/HWY/OOM/docs/blue_book.pdf (last accessed August 9, 2012). Most of the Oregon counties have adopted either the Blue Book as their own best management practices or have adopted their own independent best management practices for culverts, ditches and drains associated with roadways. *See* Marion County, Department of Public Works, Best Management Practices for Clean Water, Crew Manual, Spring 2009, pp. 17-22, http://www.co.marion.or.us/NR/rdonlyres/02DED700-CD42-4D33-83C5-D7481FB54BC1/24075/CrewManual091.pdf. (last accessed August 9, 2012).

The Ninth Circuit's dramatic revision in the manner in which the Clean Water Act is implemented

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[21] EPA recognized the Oregon Department of Forestry ("ODF") as the lead agency for nonpoint source pollution control efforts on State and private forest lands in 1979. ODF has established a series of regulatory management practices with which State and private foresters are required to comply. Oregon Nonpoint Source Control Program Plan; 2000 update, p. 20, http://www.deq.state.or.us/wq/nonpoint/docs/plan/plan.pdf (last accessed August 7, 2012).

is not only costly and unworkable, it is not needed. State and county governments are already conducting their road activities in a manner that ensures the least impact to the water quality.

CONCLUSION

The Court should reverse the decision below and clarify that deference is to be afforded to EPA's interpretation that only those access roads that are "immediately" and "directly" associated with a specific industrial facility are included within that group of access roads associated with an industrial facility. Further, the Court should reverse the Ninth Circuit for failing to afford deference to EPA's interpretation that the phrase "local access roads" as used in its storm water regulations does not include state, local or federal roads. Deference should also be afforded to EPA and the respective states' long-standing interpretation that storm water from roads used for logging purposes is controlled under the nonpoint pollution control programs of the respective states and EPA.

Respectfully submitted,

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August 2012